Supreme Court, U.S.
FILED
SEP 11 1992
OFFICE OF THE CLERK

No. 91-904

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CONCRETE PIPE AND PRODUCTS
OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION
TRUST FOR SOUTHERN CALIFORNIA,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF ON THE MERITS BY RESPONDENT

JOHN S. MILLER, JR.
(Counsel of Record)
COX, CASTLE & NICHOLSON
2049 Century Park East
Suite 2800
Los Angeles, California 90067
(310) 277-4222
Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

35pp

QUESTIONS PRESENTED FOR REVIEW [1]

(1) Do the provisions of the Multiemployer Pension Plan Amendments Act violate the Fifth Amendment rights of Concrete Pipe and Products, *as applied*, by retroactively imposing withdrawal liability on an employer who [alleges it][2] never had employees vested in the pension plan and whose collective bargaining agreements specifically limited liability to contributions made?

(2) Do the presumptions in 29 U.S.C. § 1401 favoring multiemployer plans like Construction Laborers Pension Trust for Southern California violate the due process rights of Concrete Pipe and Products by denying access to an impartial decision maker?

---

[1] The petition for a writ of certiorari was granted limited to Questions 2 and 4 presented by the petition. Question 4 presented by the petition corresponds to Question 1 of this brief, and Question 2 remains Question 2. Respondent has changed the order of the Questions Presented to conform to the change made by Petitioner in its brief on the merits.

[2] Respondent proposes a modified Question 1 and objects to the formulation of Petitioner's version on the ground that it assumes facts not in evidence. Petitioner has not established that it "never had employees vested in the pension plan." It merely speculates that this is the case. "CP&P contributed to the plan as though 100 percent of its employees would become vested, *when, in reality, few might vest*, and none in fact could [vest] based solely on employment with CP&P." Brief on the Merits by Petitioner, p. 20 (emphasis added).

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
A. The Incursion of Withdrawal Liability by Concrete Pipe and Products	1
B. The Allegations of Constitutional Defects	4
C. The History and Context of MPPAA as Applied to Concrete Pipe and Products	5
D. The Construction Laborers Pension Trust for Southern California: Its Creation, Operations, Benefits and Liabilities	5
E. Relationship Between CP&P and CLPT	11
F. The Presumptions Used In Adjudication Of The Withdrawal Liability of Concrete Pipe And Products	12
SUMMARY OF ARGUMENT	15
ARGUMENT	16
I. THE APPLICATION OF THE MPPAA TO CONCRETE PIPE AND PRODUCTS CONSTITUTES NEITHER A DENIAL OF SUBSTANTIVE DUE PROCESS NOR AN UNCONSTITUTIONAL TAKING OF PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT	16
A. This Court's Rulings in *Gray* and *Connolly* are Dispositive of the Claim of Concrete Pipe and Products; It Offers No Evidence to Remove it From the Penumbra of Those Precedents	16
B. CP&P Offers No Facts Establishing that the MPPAA Deprives it of Due Process	17

TABLE OF CONTENTS—Continued

Page

1. CP&P Errs in Contending That it Has Promised No Benefits Which Deserve the Protection of the MPPAA 17
2. CP&P Errs in Contending That its Contribution History has Imposed No "Vested Service" Liability Upon CLPT 18
3. CP&P Errs In Asserting That The MPPAA Withdrawal Liability Calculation Formula As Applied To It Is Arbitrary and Irrational 18
4. CP&P Errs In Asserting That It Is Irrational To Apportion To It Unfunded Vested Liability Arising Prior To Its Commencement Of Participation In The Plan And Increased Unfunded Vested Liability Incurred At The End Of Its Participation 20

C. CP&P Offers No Facts Establishing That The MPPAA Violates The Taking Clause Of The Fifth Amendment 21

1. CP&P Fails To Establish That The MPPAA Has An Unconstitutional Economic Impact Upon It 21
2. CP&P Offers No Evidence to Support A Finding That Application Of The MPPAA To CP&P Impairs Its Reasonable Investment-Backed Expectations 22
3. CP&P Offers No Proof That The Nature Of The Governmental Action Is In Any Way An Improper Interference With Its Property Rights 23
4. CP&P Does Not Establish That The Withdrawal Liability Assessed Under The MPPAA Constitutes A Categorical Taking In Violation Of *Lucas* 23

TABLE OF CONTENTS—Continued

Page

II. THE STATUTORY PRESUMPTIONS OF MPPAA DO NOT VIOLATE THE DUE PROCESS CLAUSE; THEY ARE BURDENS OF PROOF APPROPRIATELY ALLOCATED AND ADJUDICATED BY IMPARTIAL DECISION MAKERS 24

A. CLPT Does Not Function As A "Tribunal" And Does Not "Adjudicate" Any Issue In Withdrawal Liability Matters 25

B. Imposing The Burden of Proof Upon The Withdrawing Employer to Establish By a Preponderance of the Evidence That A Plan's Determination Is Unreasonable or Clearly Erroneous is Constitutional and Appropriate 27

C. The Presumptions In Favor Of The Actuary Are Appropriate In That The Employer Has Consented To The Actuary Being Used And Opportunity Exists For Unbiased Arbitral Review Of the Actuary's Performance 28

CONCLUSION 29

TABLE OF AUTHORITIES

Cases	Page
Connolly v. PBGC, 475 U.S. 211, 106 S.Ct. 1018 (1986)	15, 17, 21, 23
Lucas v. South Carolina Coastal Council, —— U.S. ——, 112 S.Ct. 2886, 1992 W.L. 142517 (June 29, 1992)	21, 23
Nachman Corp. v. PBGC, 446 U.S. 359, 100 S.Ct. 1723 (1980)	9
PBGC v. R.A. Gray Company, 467 U.S. 717, 104 S.Ct. 2709 (1984)	15, 17, 22
Ponce v. Construction Laborers Pension Trust for Southern California, 628 F.2d 537 (9th Cir. 1980)	6
Ponce v. Construction Laborers Pension Trust for Southern California, 582 F.Supp. 1310 (C.D. Cal. 1984)	6, 7
Schweiker v. McClure, 456 U.S. 188, 102 S.Ct. 1665 (1982)	27

Statutes	
29 U.S.C. § 186	6
29 U.S.C. § 186(c)(5)	6
29 U.S.C. §§ 1001 *et seq.*	5
29 U.S.C. § 1053	18
29 U.S.C. § 1382	26
29 U.S.C. § 1383	26
29 U.S.C. § 1401	13
29 U.S.C. § 1401(a)(3)(A)	13, 25
29 U.S.C. § 1404(c)	14
ERISA § 4203	26
ERISA § 4221(a)(3)(A)	25, 26, 27
Labor Management Relations Act of 1947, Section 302	6
Labor Management Relations Act of 1947, Section 302(a)	6
Labor Management Relations Act of 1947, Section 302(c)	6
Labor Management Relations Act of 1947, Section 302(c)(5)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-904

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF ON THE MERITS BY RESPONDENT

STATEMENT OF THE CASE [3]

A. The Incursion of Withdrawal Liability by Concrete Pipe and Products.

The petitioner, Concrete Pipe and Products of California, Inc., ("CP&P") is a California corporation formed as a wholly-owned subsidiary of Concrete Pipe

[3] All references to the Record ("R.") are to the Docket Entries of District Court Case No. 82-5184 (reproduced at J.A. 2-6), except where otherwise stated. References to evidence submitted in the arbitration below is further identified by reference to the pages of the transcript where the testimony appears and, for exhibits, to the pages where the exhibit was identified and admitted into evidence, then to the exhibit number or letter and, thereafter, to the page(s) of the exhibit.

and Products Co., Inc. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, 12. CP&P was formed to facilitate the purchase in December, 1976 of certain assets of Cen-Vi-Ro. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, 12. The assets purchased included two concrete pipe manufacturing plants with accompanying manufacturing equipment. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, 12. One plant (the "Shafter Facility") was located in Southern California on a forty acre leasehold near the town of Shafter, a small town near Bakersfield. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, 12, 50, 64; J.A. ¶ 5. The Shafter Facility had the capacity to produce 10,000 to 12,000 tons of concrete pipe per year. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, 50-51. The other plant was located in Northern California, near Sacramento. At the time of purchase, the Shafter Facility produced an estimated 7,500 to 10,000 tons of concrete pipe per year. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, 13.

After purchasing the assets from Cen-Vi-Ro, CP&P continued without interruption to operate both plants and to sell its concrete pipe. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, 12.

Cen-Vi-Ro had operated the plant in Shafter in the years prior to its purchase by CP&P. J.A. 74, ¶ 3. Employees of Cen-Vi-Ro were represented by one of a number of unions depending upon employee job classification. Among these unions was the Southern California District Council of Laborers and its affiliated local union, Local Union No. 220 (the "Laborers"). J.A. 75, ¶ 8. Cen-Vi-Ro's agreement with the Laborers provided that Cen-Vi-Ro contribute at a specified rate to the Construction Laborers Pension Trust for Southern California ("CLPT") for each hour worked by its employees who performed duties as laborers. J.A. 75, ¶¶ 7-8.

In the two years immediately preceding the sale of assets, Cen-Vi-Ro reported hours and paid contributions to CLPT as follows:

Year	Hours	Contributions	Avg. Rate
1975	35,170.50	$28,227.31	$ .80/hr.
1976	17,243.25	18,395.01	$1.06/hr.

R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. B.

CP&P, upon effecting its December, 1976, purchase of the assets of Cen-Vi-Ro, continued to operate the Shafter Facility in the same manner and with essentially the same personnel as had Cen-Vi-Ro. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, Ex. 36, 2. CP&P adopted the labor agreements of Cen-Vi-Ro in effect at the time of purchase and began making contributions to CLPT on behalf of CP&P employees. J.A. 76, ¶ 9.

In 1978, CP&P negotiated a new three-year collective bargaining agreement with the Laborers for the Shafter Facility. J.A. 76, ¶ 9. Among other provisions, this collective bargaining agreement provided for CP&P to obtain laborers as needed from the Local Union's hiring hall and provided for continuation of the contributions by CP&P to CLPT for its laborers at a rate of $1.20 per hour commencing in 1978. R. 214, Arb. Tr. 79, 79, CP&P Ex. 9, 1-3, 13. CP&P permitted the possibility of escalations of this contribution rate in 1979 and in 1980 by agreeing that 40¢ per hour, in each year, could be allocated by the Laborers at their discretion among wages and fringe benefits. R. 124, Arb. Tr. 79, 79, CP&P Ex. 9, Ex. A, 2.

In mid-1978, CP&P's orders for and production of pipe dropped to a rate of approximately 2,500 tons per year. R. 124, Arb. Tr. 64, 67, CLPT Ex. 2, 13-14. From there, demand continued to decline until production ceased in August 1979. *Id.* at 13-14. The Shafter Facility was "mothballed" pending an increase in business. J.A. 216.

CP&P reported hours and paid contributions to CLPT as follows pursuant to its Shafter Facility collective bargaining obligations:

Year	Hours	Contributions	Avg. Rate
1977	25,745.75	$ 29,337.71	$1.14/hr.
1978	41,594.50	49,913.04	$1.20/hr.
1979	17,355.00	20,826.60	$1.20/hr.
1980	40.50	48.60	
Total	84,735.75	$100,125.95[4]	

R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. B.

In October and November 1981, CP&P bargained to impasse with the Laborers over a new collective bargaining agreement, withdrew recognition of the Laborers as a representative of its laborer employees, and gave notice that its obligations under the 1978 labor agreement would terminate. J.A. 209.

Concurrently, in November, 1981, CP&P reopened its Shafter Facility to fill two orders it had solicited totalling 7,000 tons of pipe. J.A. 209. CP&P hired employees in classifications covered by its prior agreement with the Laborers. J.A. 216. It neither contributed to, nor resumed an obligation to contribute to CLPT for such work.

CP&P's actions constituted a cessation of CP&P's "obligation to contribute" to the CLPT pension plan, producing a "complete withdrawal" by CP&P from CLPT and subjecting CP&P to withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") in the amount of $190,465.57. J.A. 402, 416, 431-32.

B. The Allegations of Constitutional Defects.

CP&P asserts MPPAA is unconstitutional as applied to it essentially because:

1. It imposes liability on CP&P for actions taken by the Board of Trustees of CLPT both before and after the enactment of MPPAA to establish and increase benefit

[4] Total CP&P contributions to CLPT for December 1, 1976 through 1980, were $102,656.68. J.A. 76, ¶ 10.

levels, actions in which CP&P essentially had no say, control, or influence. Pet. Brief, § V.B. at p. 20.

2. The liability being assessed by CP&P is to pay benefits to employees other than its own while its own employees are unlikely to vest because of CP&P's brief period of contributions. Pet. Brief, § V.A. at p. 19-20.

3. The collective bargaining agreements providing for contributions into CLPT and the Trust Agreement establishing CLPT expressly limited employer liability for anything other than the hourly contributions called for in the collective bargaining agreements. *Id.* at 19-20.

4. The presumptions in favor of the decisions of CLPT, its actuary and an arbitrator deprive CP&P of access to an unbiased decisionmaker. Pet. Brief, § V.C. at p. 21.

C. The History and Context of MPPAA as Applied to Concrete Pipe and Products.

The statutory framework and history and the context of multiemployer defined benefit plans and their use of actuaries which give rise to CP&P's withdrawal liability are recounted in the "Statement" of the Brief of the Pension Benefit Guaranty Corporation as *Amicus Curiae* in Support of Respondent in this action and will not be duplicated here. *See* Brief of PBGC, pp. 1-10.

D. The Construction Laborers Pension Trust for Southern California: Its Creation, Operations, Benefits, and Liabilities.

In 1976, when CP&P replaced Cen-Vi-Ro in contributing to CLPT for work at the Shafter Facility, CLPT had been in existence for almost 15 years. It was already subject to the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq. ("ERISA") and had implemented the benefits called for by that act of Congress. R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. F, 30, Ex. I.

CLPT was established on June 15, 1962, through negotiations between the Laborers and various construction

industry multiemployer trade associations in Southern California. J.A. 15, ¶ 6; Pet. Brief § IV.B.(1) at p. 3. It is governed by the requirements of Section 302 of the Labor Management Relations Act of 1947 ("LMRA" or "Taft-Hartley Act"), 29 U.S.C. § 186, as amended.

Section 302(a) of the LMRA prohibits payments by an employer to any representative of his employees unless a specific exception in Section 302(c) applies. Section 302(c)(5) excepts from the prohibitions contributions to a pension trust fund if the fund is established "for the sole and exclusive benefit" of the employees pursuant to a written document which describes the detailed basis on which the payments are to be made. Employers or employees must be represented equally in the administration of the fund, and an arbitration procedure must be provided in the event of deadlock by the trustees. 29 U.S.C. § 186(c)(5).

As contemplated by Section 302, CLPT is governed by a Board of Trustees ("Trustees" or "Board"). Half of the Trustees are appointed by the Laborers and half are appointed by the multiemployer associations. J.A. 75 at ¶ 6.

CLPT is exclusively employer-funded, receiving its revenues from contributions made by each participating employer for each hour worked by the employer's employees. *Ponce v. Construction Laborers Pension Trust for Southern California*, 628 F.2d 537, 539 (9th Cir. 1980).

By resolution in October 1962, the Trustees were empowered to create a pension plan. *Id.* On December 27, 1962, they did so. *Id.* The Trustees implemented this plan and modified it frequently from 1962 through December 31, 1975. They did so in their discretion and without mandate from the collective bargaining parties of either benefit levels or eligibility requirements. *Ponce v. Construction Laborers Pension Trust for Southern California*, 582 F. Supp. 1310, 1312 (C.D. Cal. 1984).[5]

[5] Effective January 1, 1976, the Trustees modified the plan to comport with ERISA which compelled the implementation of ten-

The plan adopted by the Trustees at its inception and through 1975 provided pension eligibility for laborers who reached retirement age, having accumulated at least 700 hours or more of "Future Service Credit" (hours of work after June 15, 1962, for which CLPT was entitled to receive pension contributions) and who had accumulated at least 15 years of "Credited Service." "Credited Service" is 1,200 or more hours of employment in one year for which "Future Service Credit" is awardable (contributions are payable) and for employment in the industry prior to the June 15, 1962, date of establishment of the pension plan for which Past Service Credit is awardable. Initially, Past Service Credit was available for employment as far back as 1937. R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. I.

The pension benefit payable for one who retires is a flat monthly benefit multiplied by the number of years of credited service. This monthly benefit amount has been repeatedly increased by the Trustees. On each occasion, the monthly benefit increase has been given to all plan participants for all years of service. *Id.*

Both in the years before CP&P began to contribute to CLPT and after, the Trustees repeatedly improved pension benefits and liberalized eligibility requirements,[6] and the collective bargaining parties repeatedly increased hourly contribution rates payable to CLPT. The following table reflects the changes in contribution rates negotiated by the collective bargaining parties and the monthly pension benefit amounts established by CLPT:

year vesting and other eligibility requirements. R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, F, 30. In 1980, three successive 10% benefit increases were initiated by the collective bargaining parties conditioned upon the Union allocating sufficient monies within its allocation rights to provide 125% coverage of the cost of providing the increased benefit. R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. K, 3.

[6] *Ponce v. Construction Laborers Pension Trust for Southern California*, 582 F. Supp. 1310, 1312-13 (C.D. Cal. 1984). *See, also*, R. 124, Arb. Tr. 115, 116, Jt. Ex. F, 27-30; Ex. I.

CHANGES IN CONTRIBUTION RATES AND BENEFIT AMOUNTS

Effective Date Year	Month	Day	Hourly Contribution Rate Laborers	Monthly Benefit Amount Per Year of Credited Service Laborers	Maximum Normal Pension Laborers
1962	June	15	$ .10		
1963	January	1		$ 2.67	$ 53.40
1965	June	1	.15		
1966	June	1	.22	11.75	293.75
1967	June	1	.27		
1968	June	1	.32		
1969	June	1	.35		
	December	1		13.75	343.75
1970	October	1	.60	32.40	No Maximum
1971	August	1	.85		
1972	May	1	1.10		
1973	August	1	1.35		
1974	December	1	1.50		
1975	October	1	1.65		
1976	October	1	1.95		
1977	July	1	2.30		
	December	31	2.45		
1979	July	1	2.55		
1980	July	1	2.90	35.64	
1981	July	1	3.28	39.20	
1982	July	1	3.74	43.12	

R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. F, 26.

When the Laborers and the multiemployer associations established CLPT in 1962, and delegated to the Trustees the responsibility for defining, establishing, and managing a pension plan, the collective bargaining parties expressly agreed that the participating employers would not be liable for any sums other than the hourly contribution

required by the collective bargaining agreements. The Trust Agreement establishing CLPT provided:

> Section 4.07. Neither the Association or [sic] any officer, agent, employee or [sic] committee member of the Associations shall be liable to make Contributions to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to her or its own individual or joint venture operations, or to the extent that he may incur liability as a Trustee as hereinafter provided. The liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operation of the Fund or of the Pension Plan, except as may be hereafter provided in the Collective Bargaining Agreement.
>
> Section 4.08. Neither the Associations, any Individual Employer, the Union, any Local Union, nor any Employee shall be liable or responsible for any debts, liabilities or obligations of the Fund or the Trustees.

J.A. 80-81, at ¶ 32.

This understanding of the collective bargaining parties was consistent with the ordinary understanding of employers providing pension plans throughout the nation. *See Nachman Corp. v. PBGC*, 446 U.S. 359, 378, 100 S.Ct. 1723, 1735, n.28 (1980).

Following the passage of ERISA, the collective bargaining parties agreed in the 1977-1980 Laborer's Craft Master Labor Agreement, Article X, § E(4):

> The parties recognize and agree that the Pension Trust and Plan was created, negotiated, and is intended to continue to be *if permitted by law under ERISA*, a defined contribution plan and trust and that the individual Contractor's liability with regard to the pension has been and remains limited exclusively to payment of the contributions specified from time to time in collective bargaining agreements.

J.A. 82 at ¶ 34 (emphasis added).

The collective bargaining parties further provided in Appendix K to the Southern California Master Labor Agreements in 1977-1980 a notice to employees of the position of the collective bargaining parties that pension benefits were not intended to be guaranteed by the employers beyond payment of the hourly contributions. J.A. 81-82 at ¶ 33.[7]

In July, 1980, the multiemployer associations and the Laborers agreed to a new Master Labor Agreement. The agreement provided that CLPT would increase the monthly pension benefit payable for all credited service by 10% in each of three (3) succeeding years, provided that the Laborers allocated sufficient monies from the increases promised to them in the second and third years of the term of the Master Labor Agreement to fund the benefit improvement by 125% of the cost estimated by CLPT's actuary. J.A. 358; R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. F, 26, Ex. K, 3.

In 1981, when CP&P withdrew from the CLPT, CLPT was paying pensions to 7,524 pensioners and 382 beneficiaries of deceased participants. Further, CLPT had

[7] Petitioner contends that this Appendix K was incorporated by reference into the CP&P collective bargaining agreement. Respondent does not agree that this contention accurately reflects the state of the record. Respondent further notes that CP&P does not contend that it or its personnel were aware of this or any other exculpatory provision or that they relied in any way on the existence of such a provision.

5,027 active participants with vested pension rights and 11,405 active participants with credits but who had not yet vested. R. 124, Arb. Tr. 115, 116, Jt. Ex. 7, Ex. F, 6.

The employers who retained an obligation to contribute to CLPT in 1981 paid CLPT more than $81 million in recognition of hours worked by their employees. CLPT earned investment income exceeding $14 million. It paid retirees and beneficiaries $59 million in pension benefits. *Id.* at 21.

The "scheduled actuarial cost" for 1982 reflects the actuary's anticipated allocation of the contributions being received by CLPT from employers remaining in the plan in the year following the 1981 departure of CP&P. This schedule projected an average employer contribution of $3.51 per hour. Of this, $3.06 per hour was slated to be used to amortize past unfunded vested liabilities of the Plan (the same liabilities which a departing employer such as CP&P is assisting to amortize through payment of its withdrawal liability). Only 57.7¢ was expected to be needed to provide the pension benefit actually earned by the employee who worked the hour that generated the $3.51 contribution. Finally, 7.1¢ per hour was estimated as needed for administrative overhead. *Id.* at 24.

E. Relationship Between CP&P and CLPT.

CP&P has offered no evidence that it made any investigation or inquiry into CLPT, its financial condition, its plan of benefits, or its operation at any time prior to its commencing contributions to CLPT. CP&P simply began contributing to CLPT for work performed at the Shafter Facility from December 1, 1976, until its obligation to contribute ceased. J.A. 76 at ¶ 10. Other than sending in reports with contributions, CP&P makes no claim of any communication with CLPT until it received its withdrawal liability billing from CLPT.

At the time CP&P was created and began contributing, executives of it and its parent company had knowledge

of ERISA. In 1976, the parent company of CP&P, Concrete Pipe & Products Co., Inc., had maintained for some years a corporate pension plan for employees other than those covered by collective bargaining agreements. This corporate plan was in effect prior to ERISA. Mr. Stanley A. Navas, President and CEO of both Concrete Pipe & Products Co., Inc., and CP&P was actively involved in the amendment of the corporate plan to comply with ERISA and was familiar with ERISA from 1974 and thereafter. R. 124, Arb. Tr. 64, 67; CLPT Ex. 2, 100.

CP&P has also offered no evidence that it commenced an obligation to contribute to CLPT under duress or mistake or in reliance upon any misrepresentation by anyone. CP&P has not contended that it attempted to negotiate with the Laborers to divert pension contributions from CLPT to its own corporate plan or to another pension plan or to cease such pension contributions altogether on its laborers.

Mr. Navas does contend that he was unaware of the MPPAA and its potential impact upon CP&P until the day he received the withdrawal liability billing from CLPT. R. 124, Arb. Tr. 64, 67; CLPT Ex. 2, 104.

F. The Presumptions Used In Adjudication Of The Withdrawal Liability of Concrete Pipe And Products.

By letter dated January 20, 1982, CLPT asserted a claim for withdrawal liability against CP&P in the amount of $268,168.81. CLPT advised that this sum could be paid in 132 monthly installments in the amount of $2,821.80 together with a final monthly payment of $2,226.74. J.A. 36-37. (The payment plan thus contemplated paying CLPT a total of $33,861.60 in the first year.)

When CP&P refused to pay, the parties commenced litigation. At all times, CLPT contended that the withdrawal liability of CP&P arose by operation of law, not

by act of CLPT. J.A. 12 ¶ 9. CLPT pursued collection simply because the law imposed upon it an obligation

> [t]o determine the amount of defendant's withdrawal liability, to notify defendant of the amount . . ., and to effect collection. . . .

J.A. 12 ¶ 10.

CLPT has never contended in the litigation that it has acted as a "tribunal" to "adjudicate" defendant's withdrawal liability. At no time has CLPT asserted in the litigation that it is a "decisionmaker" entitled to deference in its findings. Rather, at all times, CLPT has contended:

> The presumption in favor of the Trust that requires a withdrawing Employer to carry the burden of proof that Trust's determinations are unreasonable [29 U.S.C. 1401(a)(3)(A)] is simply a constitutional allocation of burden of proof to Employer in withdrawal liability cases; hence, in order to defeat Trust's calculations, Concrete Pipe has [the] burden of showing that the determination was "unreasonable or clearly erroneous."

J.A. 384-85.

The arbitrator agreed:

> Concrete Pipe has the burden of rebutting the presumption of Section 1401 [sic] of ERISA [29 U.S.C. 1401] and establishing by a preponderance of the evidence that the determination of Plan sponsor was unreasonable. This they did not do.
>
> * * * *
>
> It is concluded, therefore, that Concrete Pipe has failed to carry the burden of overcoming the statutory presumption by a preponderance of the evidence.

J.A. 400-01.

Accordingly, the arbitrator issued his award:

> 1. Concrete Pipe and Products Company of Cali- has failed to show by a preponderance of the evidence that, in the aggregate, the actuarial assumptions and methods used by the Trust in the determination of Concrete Pipe and Products Company of California were unreasonable.

J.A. 401-02.

The District Court reviewed the decision of the arbitrator. It found with respect to its presumption under the MPPAA, 29 U.S.C. § 1404(c), that the factual finding of the arbitrator is to be upheld unless against the "clear preponderance" of the evidence:

> Presumably this means more than a mere preponderance and something less than a "clearly erroneous" standard.

J.A. 419.

The Court of Appeals affirmed. J.A. 431-32.

In upholding the arbitrator, the District Court commented on the evidence in the arbitration:

> The plan's actuary had the significant fortifying feature of being the most widely recognized in the field, with massive experience nationwide in advising pension trustees. CP&P attacked the assumptions with an actuary of vastly less experience (in fact no experience with multiemployer trusts). While the use of any economic prediction factor can be debatable, the Court cannot say, or come close to saying, that the conclusions of the arbitrator are against the clear preponderance of evidence. The Court accepts the reasoning of the arbitrator in this respect and adopts his findings.

J.A. 423.

SUMMARY OF ARGUMENT

Concrete Pipe and Products suffers neither a substantive denial of due process nor an unconstitutional taking of property as a consequence of the assessment of withdrawal liability against it under the Multiemployer Pension Plan Amendments Act of 1980. This Court's prior decisions upholding the facial validity of this statute are controlling. *PBGC v. R.A. Gray Company*, 467 U.S. 717, 104 S.Ct. 2709 (1984); *Connolly v. PBGC*, 475 U.S. 211, 106 S.Ct. 1018 (1986). Concrete Pipe and Products offers no evidence that, as applied to it, the MPPAA is irrational or arbitrary or that it has suffered an impermissible taking by reason of interference with its property expectations and rights. Concrete Pipe and Products cannot escape the facts that it commenced participation in the Construction Laborers Pension Trust for Southern California after ERISA had become effective and after virtually all of the liabilities which it objects to sharing were established and known to any employer who inquired. Further, Concrete Pipe and Products has not shown that it and its employees did not benefit from their participation in the Plan.

Similarly, Concrete Pipe and Products has not shown that the presumptions of the MPPAA deny it or any other employers due process. The presumptions favoring the correctness of determinations made by a plan are mere allocations of the burden of proof. The Plan does not act as a tribunal to adjudicate any matter.

The presumptions in favor of the actuary are likewise appropriate. Most of the assumptions used by an actuary are used with respect to the plan's overall funding management. They are relied upon for all purposes. An isolated number of assumptions apply to withdrawing employers. Bias by an actuary in this area or the exercise of undue influence upon the actuary by plan trustees can be ferreted out in the arbitration process using the existing presumptions established by Congress.

ARGUMENT

I. THE APPLICATION OF THE MPPAA TO CONCRETE PIPE AND PRODUCTS CONSTITUTES NEITHER A DENIAL OF SUBSTANTIVE DUE PROCESS NOR AN UNCONSTITUTIONAL TAKING OF PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT.

A. This Court's Rulings in *Gray* and *Connolly* are Dispositive of the Claim of Concrete Pipe and Products; It Offers No Evidence to Remove it From the Penumbra of Those Precedents.

This Court has previously addressed and rejected "facial" challenges to the constitutionality of the MPPAA on the grounds of denial of substantive due process and unconstitutional takings in violation of the Fifth Amendment. *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709 (1984); *Connolly v. PBGC*, 475 U.S. 211, 106 S.Ct. 1018 (1986). Petitioner attempts to escape from the import of these rulings by contending that, as applied to it, due process is denied and the taking occurs. To do so, it takes liberties with the record below in order to evoke the continuing concerns expressed by members of the Court in resolving *Gray* and *Connolly*.

The PBGC, in its Brief *Amicus Curiae* in Support of Respondent, expertly dissects the contentions of law advanced by CP&P in attempting to escape the dispositive effects of *Gray* and *Connolly*. CLPT will focus on the contentions of fact of CP&P.

CP&P acknowledges it has a heavy burden to bear in establishing factually that the MPPAA violates due process as applied to it and or constitutes an improper taking from CP&P without just compensation. It expresses a willingness to shoulder that burden and journey to such a result. Pet. Br. at p. 21.

The facts which CP&P chooses as fuel for its expedition, however, lack octane. They are either non-probative or

indistinguishable from those implicitly present in the facial challenges to the MPPAA previously rejected by this Court in *Gray* and *Connolly*. They cannot propel CP&P beyond the precedential shadows cast by *Gray* and *Connolly*.

B. CP&P Offers No Facts Establishing that the MPPAA Deprives it of Due Process.

CP&P asserts four points to suggest that it has been substantively denied due process under the Fifth Amendment. To succeed, CP&P must establish that Congress has acted arbitrarily and irrationally. *Gray, supra* at 729. None of these points is of assistance to CP&P.

1. *CP&P Errs in Contending That it Has Promised No Benefits Which Deserve the Protection of the MPPAA.*

First, CP&P asserts that its contribution obligation was expressly limited to the hourly contribution called for in the collective bargaining agreement. It notes that the Trust Agreement of CLPT confirms that an employer's liability is limited to its contributions.

This contention was directly rejected by this Court in *Connolly* with respect to a Taking Clause claim . To paraphrase the Court there:

> "It would be surprising indeed to discover now that, [in both cases Congress unconstitutionally had deprived the employers of due process]."

Connolly, 475 U.S. at 220, 223, 1018 S.Ct. at 1023-24, 1025. Further, CP&P asserts this position from a much weaker footing than the parties in *Connolly*. CP&P did not begin an obligation to contribute to CLPT until after the passage of ERISA had called into question the viability of exculpatory clauses. CP&P was familiar with ERISA at the time that the obligation to contribute was assumed.[8]

---

[8] On the other hand, the appellants in *Connolly* included the Trustees of the Operating Engineers Pension Trust. Those Trustees had

2. *CP&P Errs in Contending That its Contribution History has Imposed No "Vested Service" Liability Upon CLPT.*

CP&P asserts that it had no "proportional share" of the liabilities of CLPT because none of its employees could have worked sufficient years to vest in a pension for service attributable solely to employment at CP&P. This contention ignores the fact that multiemployer plans must provide portability of credits for all employers within the plan. 29 U.S.C. § 1053. CP&P has offered no evidence that its employees lack sufficient credit to be vested in CLPT.

On the contrary, all indications are that the employees on whom CP&P contributed were likely to be laborers who already had credited service with CLPT. CP&P adopted an existing labor agreement of Cen-Vi-Ro which called for contributions into CLP. CP&P signed a new labor agreement which continued the contribution obligation to CLPT and which affirmed that CP&P would obtain its employees from the local Laborers hiring hall. It is quite conceivable that each and every employee on whom CP&P contributed could have vested rights in CLPT with a corresponding liability impact on CLPT.

3. *CP&P Errs In Asserting That The MPPAA Withdrawal Liability Calculation Formula As Applied To It Is Arbitrary and Irrational.*

CP&P asserts that the formula for computing withdrawal liability is irrational and that it fails to account for exclusion rates and extended vesting schedules for

---

created and managed a pension plan established in 1960 through labor negotiations which included the same multiemployer associations that established CLPT. The Trustees in *Connolly* asserted the continuing viability of the exculpatory clauses in the face of ERISA and of MPPAA. As parties who had managed their plan in light of its exculpatory provisions, they certainly encountered a greater alteration of expectations with a potentially greater irrational effect than did CP&P.

short-term employers such as CP&P. It further argues that the formula punishes those employers who pay higher pension contributions than other employers.

CP&P offers no evidence to show that either of the foregoing features impacts CP&P adversely.

More fundamentally, each of the foregoing contentions reflects a misperception of the formula. In a multiemployer plan, particularly a construction industry multiemployer plan where short-term employers and short-term employment are common, the employees who acquire rights in the pension plan and thus impose funding burdens upon it are the long-term employees who, by and large, work for many short-term periods of employment. If CP&P happened to be the last employer providing a particular long-term industry employee with the employment needed for that employee to vest, CP&P's short-term employment was, in a sense, very expensive to the pension plan as a whole, because it facilitated that employee finally acquiring his vested right.

Multiemployer plans exist, in large part, because of this short-term employer phenomenon and the need of such employers for qualified employees and the consequent need of the long-term industry employees for a common source for retirement savings.

CP&P's contention regarding the irrationality of apportioning withdrawal liability based on comparisons of total contributions is not properly before the Court. The Fifth Amendment issues are on an "as applied" basis. As a manufacturing plant employer, CP&P paid a lower contribution rate than the majority of construction industry employers in CLPT. Were CP&P's contention correct, it would have been benefited by the formula rather than deprived.

Nevertheless, the challenge is ill-considered. Were CP&P's contribution rate to be double that which it did

pay, its employees would have earned greater benefit credits as a result of the higher contribution. Thus, the liability to the CLPT would be greater. Moreover, once the contribution level of the master labor agreement is equalled, contribution rates simply go no higher.

1. *CP&P Errs In Asserting That It Is Irrational To Apportion To It Unfunded Vested Liability Arising Prior To Its Commencement Of Participation In The Plan And Increased Unfunded Vested Liability Incurred At The End Of Its Participation.*

CP&P's final challenge to the rationality of the MPPAA is its contention that it should not be saddled either with the funding promises made by CLPT before it commenced participation or with the funding consequences of the benefit improvement made in 1980 (at the instance of the collective bargaining parties). Neither contention is supported by facts reflecting any irrational impact.

CP&P simply started contributing to CLPT in 1976. It offers no facts to establish that it inquired into the financial condition of CLPT, its obligations or its plan of benefits. Presumably, CP&P needed employees, knew the Laborers and Cen-Vi-Ro had them, and put them on the payroll, commencing participation in CLPT without much thought. At the time it commenced participation, the president of CP&P was aware of the impact of ERISA on pension plans. No evidence is offered that CP&P attempted to avoid assuming an obligation to contribute. By participating in CLPT rather than establishing its own plan or refusing to provide pension benefits, CP&P may have incurred liability but, overwhelmingly, the liability it incurred is of its own making. If there was an irrational act that produced the liability of CP&P, it was not an act of Congress.

C. CP&P Offers No Facts Establishing That The MPPAA Violates The Taking Clause Of The Fifth Amendment.

CP&P asserts that its "property" has been taken as a consequence of the assessment against it of withdrawal liability in the amount of $190,465.57. CP&P purports to provide facts entitling it to a determination that the liability constitutes an uncompensated taking in violation of the Fifth Amendment both under the "*ad hoc*" factors noted by this Court in *Connolly* and the categorical approach discussed most recently in *Lucas v. South Carolina Coastal Council*, —— U.S. ——, 112 S.Ct. 2886, 1992 W.L. 142517 (June 29, 1992).

As will be demonstrated, the circumstances identified do not establish an unconstitutional taking by Congress of CP&P's property.

1. *CP&P Fails To Establish That The MPPAA Has An Unconstitutional Economic Impact Upon It.*

Referencing the concurring opinion in *Connolly*, CP&P asserts that the withdrawal liability assessment represents a devastating economic impact which merely provides funds to CLPT to pay for benefit increases and vesting schedule changes occuring both prior to CP&P's creation in 1971 and at the end of its participation in 1980 and 1981.

The fallacy underlying these contentions has been discussed previously. The contributions paid to CLPT by CP&P may well have enabled employees of CP&P to receive pensions in their retirement years. CP&P has not shown otherwise. Further, when CP&P chose to participate in CLPT, it had the ability to know what the plan was that CLPT provided and how it was functioning. If CP&P chose not to educate itself concerning a business matter of some potential importance, Congress and the taxpayers should not be prohibited from leaving CP&P to shoulder the burden of its alleged mistake.

CP&P can only complain of the enactment of the MPPAA, ERISA already being in place when CP&P commenced contributing to CLPT. MPPAA represented a "prophylactic extension" of ERISA. *Connolly*, 475 U.S. at 231, 106 S.Ct. at 1029. CP&P has not proven that MPPAA deprives it of property unconstitutionally. Indeed, the record reflects that CP&P re-opened the Shafter Facility for the purpose of producing 7,000 tons of concrete pipe, almost a year's worth of production. By virtue of having withdrawn from CLPT, it had no obligation to pay CLPT $1.20 for each hour worked by its laborers as they performed that work. Conceivably, the absence of the contribution obligation facilitated CP&P's acquiring the work. Whatever the case may be, CP&P relieved itself of an obligation to pay money into CLPT. In doing so, it reduced the hours of contributions that would otherwise have been received by CLPT, and retained those dollars to be used for its own purposes. This prospect of a "diminishing contribution base" in multiemployer plans is precisely one of the reasons underpinning Congress' determination to modify ERISA and provide for withdrawal liability. *Gray*, 467 U.S. at 722, n.2, 104 S.Ct. at 2714.

2. ***CP&P Offers No Evidence to Support A Finding That Application Of The MPPAA To CP&P Impairs Its Reasonable Investment-Backed Expectations.***

CP&P offers no evidence that it had any expectations, investment-backed or otherwise, when it began contributing to CLPT in December 1976. The labor agreement it adopted did call for payment of a specified amount per hour, but CP&P's President was aware of ERISA. CP&P did not inquire into the condition of CLPT, its financial condition or plan of benefit. It did not negotiate to avoid assuming an obligation to contribute to CLPT. It did not chose to limit its potential pension liability by either refusing to participate in any pension plan or by choosing to offer a plan over which it maintained control. CP&P

offers no evidence that it was even aware of the exculpatory provisions of the Trust Agreement or the Master Labor Agreement. It certainly offers no evidence that it relied on any representations or misrepresentations of any entity or individual.

CP&P has simply not established either that it had any distinct investment-backed expectation when it began sending checks to CLPT or that those expectations were impaired by the MPPAA.

3. ***CP&P Offers No Proof That The Nature Of The Governmental Action Is In Any Way An Improper Interference With Its Property Rights.***

CP&P complains that the withdrawal liability imposed upon it is governmental action assessing pension liability for employees of entities other than CP&P. However, it offers no contentions not before the Court in *Connolly*.

CP&P has less reason to complain than the litigants in *Connolly* since it did not commence contributions to CLPT until after the passage of ERISA. CP&P had the ability to know the promises CLPT had made to employees of other employers—the unfunded obligations of CLPT. CP&P was on notice that Congress expected for participating employers in multiemployer plans to fund the benefit promises that had been made in the years prior to ERISA as well as any future promises that would be made.

4. ***CP&P Does Not Establish That The Withdrawal Liability Assessed Under The MPPAA Constitutes A Categorical Taking In Violation Of Lucas.***

CP&P asserts that a taking occurred within the categories established in *Lucas v. South Carolina Coastal Council*, *supra*. The basis for this contention is that CP&P is to be deprived of 46% of its book net value without any

compensation. CP&P offers no proof of this event, however.

It is true that a substantial monetary liability has been incurred by CP&P. However, CP&P was compensated for that liability. It may not, in hindsight, feel that the bargain was worth it, but it was compensated.

After ERISA placed the business community on notice that the promises made in pension plans would be funded by the employers, CP&P chose to participate in CLPT. In return, it received the labors of its laborer employees. It received the administrative services of a pension plan without having to worry about establishing and administering its own. It may even have received the satisfaction of providing its employees with benefits believed by them to be of value. And it received all of this without having to expend any effort to investigate the product it was purchasing and the potential future benefits and burdens of that product. In short, it purchased ease of doing business and saved effort. What it complains about today is the price.

CLPT does not contend that the price is nominal. It does contend that the bill is not unconstitutional.

II. THE STATUTORY PRESUMPTIONS OF MPPAA DO NOT VIOLATE THE DUE PROCESS CLAUSE; THEY ARE BURDENS OF PROOF APPROPRIATELY ALLOCATED AND ADJUDICATED BY IMPARTIAL DECISION MAKERS.

Once again, CLPT defers to the Brief *Amicus Curiae* of PBGC in Support of Respondent for its deft presentation on the law and the legislative, administrative and arbitral context surrounding the presumptions of the MPPAA. Respondent offers the view of this multiemployer plan on the appropriate interpretation of the presumptions of MPPAA.

For over a decade, CLPT has been implementing the withdrawal liability mandates of the MPPAA. It did not

ask for this task. It has proceeded to carry out the duties of the MPPAA because they are there. Its papers throughout this case reflect CLPT's view of its role.

Thus, it is with some sense of wonderment that CLPT stands before this Court labeled "a biased adjudicator." CLPT is not and never has been an adjudicator in MPPAA matters.[9]

A. CLPT Does Not Function As A "Tribunal" And Does Not "Adjudicate" Any Issue In Withdrawal Liability Matters.

In January 1982, CLPT advised CP&P that it believed CP&P owed withdrawal liability. When CP&P refused to pay and litigation commenced, CLPT, at all times, proceeded on the assumption that withdrawal liability arose by operation of law, not by determination, adjudication, or other act of CLPT. J.A. 12 ¶ 9. CLPT pursued CP&P for collection simply because the law imposed upon it an obligation:

> [T]o determine the amount of defendant's withdrawal liability, to notify defendant of the amount . . ., and to effect collection. . . .

J.A. 12 ¶ 10.

CLPT has contended throughout this case (and in all other MPPAA cases in which it has been involved) that the presumption in favor of the correctness of CLPT's determinations of any matter within the contemplation of Section 4221(a)(3)(A) of ERISA, 29 U.S.C. § 1401(a)(3)(A), is simply an allocation of a burden of proof to the employer. For the employer to prevail, it merely must show that CLPT's determination was "unreasonable or clearly erroneous." J.A. 384-85.

It is the view of CLPT, as evidenced by its papers in this case, that whether or not an employer has withdrawn

---

[9] CLPT disputes the allegation of bias as well, but the issue is irrelevant.

is an objective event wholly unrelated to CLPT and its role. Section 4203 of ERISA establishes that an employer withdraws from a plan if, in fact, certain objective events occur. 29 U.S.C. § 1383. This result occurs whether CLPT knows of it or not.

CLPT's role commences only "when an employer withdraws." 29 U.S.C. § 1382. Once that event happens, then and only then does the plan sponsor, CLPT in this case, determine the amount of the liability, notify the employer of the amount, and collect the amount. 29 U.S.C. § 1382.

Contrary to the allegations of Petitioner and its *Amici* regarding purported mischief elsewhere, CLPT views the determination of the amount of withdrawal liability to be an arithmetic calculation based upon the ongoing actuarial procedures for the Plan, supplemented by several actuarial assumptions unique to withdrawal liability which are identified and developed by the same actuary that CLPT uses for all purposes.

The plan review mechanism for CLPT serves precisely as PBGC describes it. It provides an informal pre-arbitration procedure by which an employer who has been assessed for withdrawal liability and CLPT representatives may communicate, debate, inform and educate one another as to the facts, circumstances and merits, or demerits of a specific claim.

No adjudication of any kind occurs until CLPT and an employer proceed either before a district court or agree to an arbitrator. Before an arbitrator, the threshold question is one of objective fact, did the employer withdraw or did he not. If it is a close call, the burden under the preesumption of Section 4221(a)(3)(A) must be borne by the employer to establish by a preponderance of the evidence that the plan's determination was unreasonable or clearly erroneous.

B. Imposing The Burden of Proof Upon The Withdrawing Employer to Establish By a Preponderance of the Evidence That A Plan's Determination Is Unreasonable or Clearly Erroneous is Constitutional and Appropriate.

Allocating the burden of the Section 4221(a)(3)(A) presumption of correctness in favor of the plan and against the employer is logical and appropriate in the overall context of the MPPAA. In enacting MPPAA, Congress, in essence, said to an employer leaving a multiemployer plan: "If you go, you owe—unless you are entitled to an exemption or other mitigation factor." In the typical case that arises the employer is, in fact, gone in the sense that he has ceased having an obligation to contribute. Thus, in terms of the purpose of MPPAA, the employer "owes" unless he can establish a right to an exception.

In theory, withdrawing employers who are not entitled to an exception know that they have withdrawn and that they owe. They should, therefore, be expected to telephone the plan administrator and ask for a bill to be computed and sent such that they may commence payments.

Some employers do view their obligation this way. Many more, like many taxpayers, would prefer to keep the money unless and until faced by a collector. CLPT is the designated tax collector. Congress created the tax for a departing employer. The departed employer owes it, except to the extent he can surmount the burden and prove he is allowed an exemption or reduction. The actuary calculated it. CLPT attempts to collect it. If a dispute arises, an arbitrator or a court adjudicates it. Such an allocation of a burden of proof is constitutional. *Schweiker v. McClure*, 456 U.S. 188, 196, 102 S.Ct. 1665, 1670-71 (1982).

C. The Presumptions In Favor Of The Actuary Are Appropriate In That The Employer Has Consented To The Actuary Being Used And Opportunity Exists For Unbiased Arbitral Review Of The Actuary's Performance.

The precise liability assessed against an individual employer upon withdrawal is largely the product of the numbers, estimates and assumptions used by the plan's actuary. Having an adequate basis for challenging such an actuary is important for an employer where the liability can vary widely depending upon the assumptions chosen.

However, the "right" of an employer in withdrawing to challenge the plan actuary's assumptions point by point is overstated. Many of the assumptions of the actuary as to which such discretion exists are assumptions that are used in the day-to-day management of the plan.

For example, in this case, the employer questioned the Plan's actuary concerning its estimate of plan liability for earned but unrecorded years of vested credit of plan participants. J.A. 236-243. This phenomenon exists because of incomplete early plan records. The estimate which the actuary deploys was developed in 1976, approximately on the date on which CP&P began to contribute and long before enactment of the MPPAA or CP&P's withdrawal. CP&P's actuary expressed concern over the reasonableness of the Plan actuary's assumption in this regard. J.A. 270.

This exchange never became material to the outcome of this case but it is instructive as to the reason for bestowing upon the Plan's actuary an overall presumption of correctness unless the assumptions are found to be unreasonable in the aggregate.

CP&P lived with this particular actuarial assumption for its entire participation period in the Plan. All other employers likewise lived with it. To the extent that the assumption impacts estimates of liability, the Trustees

made decisions in managing the Plan over the years which were influenced by this assumption. The collective bargaining parties might well have made decisions in negotiating contribution rates based upon the effects of this actuarial assumption.

Plan funding is based upon the educated guesses of the actuarial profession. It is appropriate for deference to be paid to the actuary responsible for the particular plan by an employer who participated in the plan.

An employer has an adequate ability to impeach an actuary by showing either that the assumptions are, in the aggregate, unreasonable or by showing that evidence exists that the actuary was improperly influenced. As the Briefs *Amici Curiae* of the PBGC and of the National Coordinating Committee for Mulutiemployer Plans (the "NCCMP") reflect, arbitrators have not had difficulty in rejecting the position of a Plan's actuary in the foregoing circumstances. Unreasonableness vis-a-vis withdrawing employers will tend to show up in the actuarial assumptions that most directly impact that precise computation. And the exercise of undue influence tends to leave footprints. Brief of NCCMP, p. 20 and n.12.

CONCLUSION

For the foregoing reasons, Respondent Construction Laborers Pension Trust for Southern California respectfully urges this Court to affirm the decision of the court of appeals in this case.

Respectfully submitted,

JOHN S. MILLER, JR.
(Counsel of Record)
COX, CASTLE & NICHOLSON
2049 Century Park East
Suite 2800
Los Angeles, California 90067
(310) 277-4222
Counsel for Respondent